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State v. Ensminger Appellant's Brief Dckt. 42207

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42207
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2014-1626
v.)	
)	
TERRY ALAN ENSMINGER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE THOMAS F. NEVILLE
District Judge

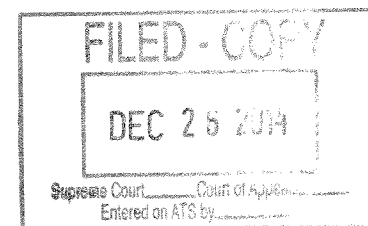
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL	3
ARGUMENT	4
I. The District Court Erred When It Entered A No Contact Order Within The Judgment Of Conviction As It Is Invalid Because It Contains No Discernible Date Of Expiration And Fails To Conform With The Requirements Of I.C.R. 46.2	4
II. The District Court Abused Its Discretion When It Sentenced Mr. Ensminger To A Unified Sentence Of Five Years, With Two And One-Half Years Fixed, Following His Plea Of Guilty To Felony Violation Of A No Contact Order.....	8
CONCLUSION.....	10
CERTIFICATE OF MAILING.....	11

TABLE OF AUTHORITIES

Cases

<i>Hollon v. State</i> , 132 Idaho 573 (1999).....	10
<i>Nelson v. Hayden</i> , 138 Idaho 619 (Ct. App. 2003).....	8
<i>State v. Alberts</i> , 121 Idaho 204 (Ct. App. 1991).....	11
<i>State v. Castro</i> , 145 Idaho 173 (2008)	6, 7
<i>State v. Cotton</i> , 100 Idaho 573 (1979)	9
<i>State v. Jackson</i> , 130 Idaho 293 (1997).....	9
<i>State v. Jeppesen</i> , 138 Idaho 71 (2002)	8
<i>State v. Reinke</i> , 103 Idaho 771 (Ct. App. 1982).....	9
<i>State v. Shideler</i> , 103 Idaho 593 (1982).....	10, 11
<i>Wilson v. State</i> , 133 Idaho 874 (Ct. App. 2000)	8
<i>Wright v. Georgia</i> , 373 U.S. 284 (1963).....	7

Statutes

I.C. § 18-920	5, 6, 8
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Rules

I.C.R. 46.2	<i>passim</i>
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STATEMENT OF THE CASE

Nature of the Case

Terry Ensminger pled guilty to one count of felony violation of a no contact order. He received a unified sentence of five years, with two and one-half years fixed. Mr. Ensminger asserts that the no contact order included on the judgment of conviction fails to meet with almost every requirement contained within Idaho Criminal Rule 46.2 and, therefore, asks this Court to vacate the no contact order entered by the district court as part of the judgment of conviction. Mr. Ensminger also contends that his sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts.

Statement of the Facts & Course of Proceedings

Between September 12 and 28, 2013, Mr. Ensminger attempted to contact his ex-wife by telephone 74 times while he was in jail.¹ (Presentence Investigation Report (*hereinafter*, PSI),² pp.2-3.) At the time of the contact and attempted contact, there were several no contact orders in place between Mr. Ensminger and his ex-wife. (PSI, p.3.)

As Mr. Ensminger had been convicted of two other no contact order violations in the past five years, he was charged by information with three counts of felony violation of a no contact order. (R., pp.43-45.) Pursuant to a plea agreement, Mr. Ensminger pled guilty to one count of felony violation of a no contact order. (4/21/14 Tr., p.26, L.3

¹ These were not hostile phone calls—each call began with either Mr. Ensminger or his ex-wife using a term of endearment such as “Hon” or “Dear.” (PSI, p.56.) In fact, Mr. Ensminger’s ex-wife advised law enforcement that she wanted Mr. Ensminger to stop calling only because she could not afford to keep accepting the collect calls. (PSI, p.56.)

– p.27, L.1; R., pp.47-51.) Pursuant to the terms of the plea agreement, the State agreed to dismiss the remaining two counts, not to file a persistent violator sentencing enhancement, not to file additional charge in police reports numbers 13-3769 and 14-6667, and to recommend a sentence of five years, with three years fixed, concurrent with Mr. Ensminger’s Ada County case.³ (4/21/14 Tr., p.6, L.6 – p.8, L.16; R., p.52.) The district court accepted Mr. Ensminger’s guilty plea and ordered a PSI. (4/21/14 Tr., p.26, L.15 – p.27, L.21; R., p.52.)

At the sentencing hearing on June 2, 2014, the State recommended a sentence of five years, with three years fixed. (6/2/14 Tr., p.35, Ls.1-4.) Mr. Ensminger’s counsel recommended a unified sentence of two years, with one year fixed. (6/2/14 Tr., p.42, Ls.23-25.) The district court sentenced Mr. Ensminger to five years, with two and one-half years fixed, and ordered that the time be served concurrently with the sentence for Mr. Ensminger’s other conviction. (6/2/14 Tr., p.65, Ls.10-16; R., pp.57-60.)

At his sentencing hearing, Mr. Ensminger asked the district court to remove or modify the no contact order the State asked to be entered against him. (6/2/14 Tr., p.38, Ls.25.) The district court denied the motion and entered a new no contact order prohibiting Mr. Ensminger from having contact with Mr. Ensminger’s ex-wife, Leann Mayden, for five years. (6/2/14 Tr., p.39, L.16 – p.40, L.4; R., p.55.) However, the written judgment of conviction also contained a no contact order provision which utilized the language “shall have no contact, directly or indirectly, with the victim, Leann Mayden” but reflected no expiration date. (6/2/14 Tr., p.4, Ls.3-4; R., p.58.)

² The designation PSI shall refer to the electronic file containing the PSI and all documents attached to the PSI.

³ Mr. Ensminger had been sentenced to five years, with two years fixed, in Ada County case number 2013-10290, in which he was convicted of a felony no contact order violation. (6/2/14 Tr., p.36, Ls.8-10, p.43, Ls.4-8, 65, Ls.12-13.)

On June 6, 2014, Mr. Ensminger appealed from the judgment of conviction.
(R., pp.62-64.)

ISSUES

1. Did the district court err when it entered a no contact order in the judgment of conviction that is invalid due to a lack of any discernible date of expiration and fails to conform to the requirements of I.C.R. 46.2?
2. Did the district court abuse its discretion when it sentenced Mr. Ensminger to a unified sentence of five years, with two and one-half years fixed, following his plea of guilty to felony violation of a no contact order?

ARGUMENT

I.

The District Court Erred When It Entered A No Contact Order Within The Judgment Of Conviction As It Is Invalid Because It Contains No Discernible Date Of Expiration And Fails To Conform With The Requirements Of I.C.R. 46.2

At sentencing, over Mr. Ensminger's objection, the district court entered a no contact order against Mr. Ensminger that continues to be in force. (R., p.55.) At the time, Mr. Ensminger objected to the entry of a no contact order and moved the court to either remove or to modify the no contact order so that he would be able to have written contact with his ex-wife. (6/2/14 Tr., p.38,L.16 – p.39, L.5.) Although the district court noted that the ex-wife wished to have contact with Mr. Ensminger, and the State did not object to written communications, the district court nonetheless found the relationship to be "unhealthy" and put in place a five year no contact order which prohibited contact of any kind between the two parties. (6/2/14 Tr., p.38, Ls.1-15, p.39, Ls.6-13, p.39, L.21 – p.40, L.4; R., p.55.) On appeal, Mr. Ensminger does not challenge this properly entered no contact order. However, in addition to entering a no contact order on the Ada County form (R., p.55), the district court also included a proviso on the judgment of conviction that prohibited Mr. Ensminger from having contact with his ex-wife, (R., p.58.) This proviso contained no end date and otherwise did not comply with the requirements of I.C.R. 46.2 and I.C. § 18-920. (R., p.58.) Mr. Ensminger contends that the no contact order proviso contained within the judgment of conviction is invalid because it fails to contain a date of expiration, and fails to comport with the requirements of I.C.R. 46.2.

This Court exercises free review over the question of whether a criminal no contact order is entered in compliance with relevant statutes and court rules. *State v.*

Castro, 145 Idaho 173, 175 (2008). Criminal no contact orders are authorized under I.C. § 18-920, which permits the district court to enter a no contact order when a defendant is charged with, or convicted of, a list of enumerated offenses, or for “any other offense for which a court finds that a no contact order is appropriate.” I.C. § 18-920(1). This statute makes it a criminal offense to violate such a no contact order. I.C. § 18-920. The specific minimum requirements for issuance of such an order are enumerated in I.C.R. 46.2 which provides, in pertinent part, that:

(a) No contact orders issued pursuant to Idaho Code § 18-920 shall be in writing and served on or signed by the defendant. Each judicial district shall adopt by administrative order a form for no contact orders for that district. **No contact orders must contain, at a minimum, the following information:**

- (1) The case number, defendant’s name and victim’s name;
- (2) A distance restriction;
- (3) That the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case;
- (4) An advisory that:
 - (a) A violation of the order may be prosecuted as a separate crime under I.C. § 18-920 for which no bail will be set until an appearance before a judge, and the possible penalties for this crime,
 - (b) The no contact order can only be modified by a judge, and
 - (c) When more than one domestic violence protection order is in place, the most restrictive provision will control any conflicting terms of any other civil or criminal protection order.

I.C.R. 46.2(a) (emphasis added).

Virtually none of the advisories that are mandated for a valid no contact order under I.C.R. 46.2 are found in the no contact order that was entered by the district court

in the judgment of conviction. This order was set forth in its entirety within Mr. Ensminger's judgment of conviction and provided: "The defendant shall have no contact, directly or indirectly, with the victim, Leann Mayden." (R., p.58.)

This order was not on a separate form as required by I.C.R. 46.2(a). The order contains no distance restriction whatsoever. See I.C.R. 46.2(a)(2). The order does not contain a date of termination. See I.C.R. 46.2(a)(3); see also *Castro*, 145 Idaho at 175 (holding that the amendment of I.C.R. 46.2 to require inclusion of a date of termination was necessary as it was contrary to public policy to permit criminal no contact orders to remain in "enshrined perpetuity"). There is no advisory in this order at all regarding any of the potential criminal penalties that may be imposed – as a separate criminal offense – for a violation of this order; that the order could only be modified by a judge; or that, if another no contact order or domestic violence protection order is in place, that the more restrictive provisions would control what contacts are permitted. See I.C.R. 46.2(a)(4).

Each of the required provisions and advisories for a valid no contact order under I.C.R. 46.2(a) are either deficient, or entirely absent from, the no contact order entered as part of the judgment in this case. These requirements are not merely procedural formalities that have little bearing on the overall validity of a criminal no contact order. The requisite information is essential in order to comport with due process requirements as to notice to those impacted by such a no contact order.

Due process requires that the charged individual have prior notice of the no-contact order before criminal liability can be imposed on the basis of an alleged violation of that order's terms. "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." *Wright v. Georgia*, 373 U.S. 284, 293 (1963). In fact, even when the

regulation at issue is a prison rule, as opposed to a criminal statute, due process requires fair notice that the conduct at issue is prohibited before a sanction can be imposed. *See, e.g., Nelson v. Hayden*, 138 Idaho 619, 622 (Ct. App. 2003).

Regarding penal laws of general applicability, satisfying the notice requirement demanded by due process is fairly straightforward – the statute itself that defines a criminal offense is generally deemed to put the public on notice as to what conduct may or may not subject them to criminal punishment. *See, e.g., Wilson v. State*, 133 Idaho 874, 880 (Ct. App. 2000). As was noted by the *Wilson* Court, “it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed.” *Id.*

But no-contact orders that are entered solely against a particular individual are different. Unlike criminal statutes, which define criminal offenses generally and apply to all those subject to the laws of Idaho, criminal no-contact orders are issued solely against one individual and are frequently directed at contacts that would be entirely legal in absence of the individualized order. *See* I.C. § 18-920. In addition, no person may be arrested for the offense of violation of a no-contact order without a warrant unless there is probable cause to believe both that the person has violated the no-contact order and that the person had prior notice of the order. I.C. § 18-920(4).

In sum, the district court’s no contact order entered as part of the judgment in this case fails to meet with virtually every mandatory requirement for criminal no contact orders set forth in I.C.R. 46.2(a). However, this Court treats the provisions of a sentence relating to criminal no contact orders as severable from the remaining sentence. *See State v. Jeppesen*, 138 Idaho 71, 75 (2002). Accordingly, where the no contact order is invalid, this Court will vacate the no contact order as a severable

provision from the underlying judgment of conviction and sentence. *Id.* Mr. Ensminger therefore asks that this Court vacate the no contact order entered by the district court as part of the judgment of conviction and remand this case for entry of an amended judgment of conviction omitting all no contact provisos.

II.

The District Court Abused Its Discretion When It Sentenced Mr. Ensminger To A Unified Sentence Of Five Years, With Two And One-Half Years Fixed, Following His Plea Of Guilty To Felony Violation Of A No Contact Order

Mr. Ensminger asserts that, given any view of the facts, his unified sentence of five years, with two and one-half years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Ensminger does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Ensminger must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of Mr. Ensminger's rehabilitative potential, the district court abused its discretion in sentencing him excessively. The district court failed to consider the fact that Mr. Ensminger had support in the community (should the no contact order be lifted or modified) and that, with programming, Mr. Ensminger could likely be successful in the community. (PSI, pp.252-53.)

Mr. Ensminger has strong support from family members and friends. See *State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts). Mr. Ensminger's ex-wife wrote a supportive letter to the district court which advised that she was not afraid of Mr. Ensminger and in which she advocated treatment for Mr. Ensminger, not prison time. (PSI, pp.252-53.) Further, Mr. Ensminger desperately wants to be able to help his adult daughter and her young son. Mr. Ensminger told the district court at sentencing that the main reason he was trying to contact his ex-wife in violation of the no contact order(s) was to try to find his grandson, whom Mr. Ensminger believed his daughter was in the process of giving up for adoption. (6/2/14 Tr., p.46, L.24 – p.47, L.1, p.60, Ls.12-14; PSI, p.13.)

The Idaho Supreme Court has recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Ensminger reported a history of mental illness, specifically, Bipolar Disorder. (PSI, p.14.) Mr. Ensminger believes an evaluation and treatment may be helpful to him; however, no evaluation was ordered by the district court. (PSI, pp.17-18.) Mr. Ensminger was diagnosed with bipolar disorder while at the Idaho Department of Correction in 2007. (PSI, p.15.) As a result of the bipolar disorder, Mr. Ensminger experiences depression and mood swings. (PSI, p.15.) Mr. Ensminger

also has epilepsy, which caused a severe strain on his family when he was younger. (PSI, pp.11-12, 14.) He is taking medication to manage both the epilepsy and his bipolar disorder. (PSI, pp.14-15.)

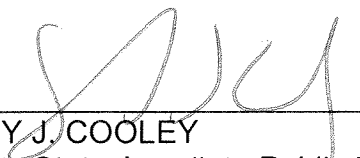
Further, Mr. Ensminger expressed remorse for his acts. Mr. Ensminger told the PSI investigator that he felt bad about committing the crime. (PSI, p.4.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Ensminger asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his mental health condition and remorse, it would have imposed a less severe sentence.

CONCLUSION

Mr. Ensminger respectfully requests that this Court vacate the judgment of conviction containing the no contact provision. Mr. Ensminger also requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 26th day of December, 2014.



SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:


TERRY ALAN ENSMINGER
INMATE #109514
IMSI
PO BOX 51
BOISE ID 83707

THOMAS F NEVILLE
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANSOM BAILEY
ADA COUNTY PUBLIC DEFENDER'S OFFICE
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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'EAS', with a long horizontal stroke extending to the right.

EVAN A. SMITH
Administrative Assistant

SJC/eas